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NO. 87-6302

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

* * * * * * * * *

WILLIAM M. HATTEN, Petitioner
V.
JACK M. RAINS, Secretary of State
for the State of Texas, Respondent;

LARRY VESELKA, Chairman, Harris County
Democratic Party, Respondent.

* * * * * * * * *

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

* * * * * * * * *

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
First Assistant Attorney General

LOU McCREARY
Executive Assistant Attorney General

LAURI J. SCHNEIDAU
Asst. Attorney General
P.O. Box 12548
Capitol Station
Austin, TX 78711-2548
Of Counsel

JAMES C. TODD, Chief
General Litigation Division
P.O. Box 12548
Capitol Station
Austin, TX 78711-2548
Counsel of Record

ATTORNEYS FOR RESPONDENT JACK M. RAINS

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QUESTION PRESENTED

I. Whether the mandatory retirement provision of the Texas Constitution, by barring persons over 75 years of age from seeking elective office as a state district judge, is violative of Petitioner's First Amendment right of access to the ballot, or of Petitioner's Fourteenth Amendment right of access to the ballot.

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STATEMENT OF THE CASE

The facts underlying this controversy are not in dispute. Respondent Rains agrees with the first four paragraphs of the Statement of the Case as contained in the Petition for Writ of Certiorari. Respondent Rains contests Petitioner's description of the Court of Appeals decision, which was contained in the Statement of the Case, and asserts the following:

The Court of Appeals affirmed the District Court issuance of summary judgment in favor of Respondent. The Court of Appeals noted that it was bound by this Court's decisions in which it summarily affirmed *Diamond v. Cuomo*, 70 N.Y.2d 338, 514 N.E.2d 1356 (1987), *appeal dismissed*, ___ U.S. ___, 108 S.Ct. 2008 (1988), and *Maresca v. Cuomo*, 64 N.Y.2d 242, 475 N.E.2d 95 (1984), *appeal dismissed*, 474 U.S. 802 (1985). Those cases were virtually identical to the case at bar.

REASONS FOR DENYING THE WRIT

1. A State Constitutional provision restricting eligibility for election as a state district judge is valid under U.S. Constitutional considerations.

The Fifth Circuit correctly affirmed the dismissal of Petitioner's action on the ground that mandatory retirement at age 75 for state judges did not violate equal protection as a restriction on ballot access and a burden on the fundamental First Amendment right of association. *Hatten v. Rains*, 859 F.2d 687 (5th Cir. 1988).

In upholding Article V, §1-a of the Texas Constitution, the Fifth Circuit observed that the U.S. Supreme Court had spoken twice to the instant issue "in cases with virtually identical facts": *Diamond v. Cuomo*, 70 N.Y.2d 338 (1987), *appeal dismissed*, ___ U.S. ___, 108 S.Ct. 2008 (1988) and *Maresca v. Cuomo*, 64 N.Y.2d 242 (1984), *appeal dismissed*, 474 U.S. 802 (1985). In *Diamond*, the Supreme Court examined New York laws requiring the retirement of elected but not appointed judges at the age of 70. The *Maresca* case was a previous challenge to the law when it affected both elected and appointed judges. The New York Court of Appeals upheld the law in both cases, and the U.S. Supreme Court dismissed both of the appeals for lack of substantial federal questions. In light of the summary dismissals on the merits of these New York cases, the Fifth Circuit rejected Petitioner's argument that the ballot access restriction in this case impermissibly infringed the First Amendment right of access to the ballot.

Contrary to Petitioner's assertions, the Fifth Circuit did not consider itself barred from considering the claim because of this Court's summary affirmances of *Diamond* and *Maresca* for

lack of a "substantial federal question." The Co of Appeals, rather, correctly noted that it bound by those decisions. "Votes to aff summarily, and to dismiss for want of a substan federal question, it hardly needs comment, votes on the merits." *Hicks* v. *Miranda*, 422 U 332, 349 (1975), *quoting Ohio ex rel. Eaton Price*, 360 U.S. 246 (1959).

In evaluating the present case, the Fi Circuit properly applied rational basis review Art. V., §1-a and evaluated the proffe rationales for the legislative enactment. The Fi Circuit thereby concluded that mandatory retirem at age 75 does not violate the equal protect clause in its application of access to the ball The *Diamond* and *Maresca* cases used the ident constitutional analysis, in finding no denial plaintiffs' rights to equal protection of the l after a determination of the rationality of N York's system for choosing and retiring judges.

The Fifth Circuit's decision that the Te Constitution did not violate Petitioner's F Amendment right of access was also in c agreement with every circuit court deciding suc question. Three circuits reviewing the question whether statutory or state constitutional provisi requiring judges to retire at a certain age vio the First and Fourteenth Amendments have upheld the age restrictions and have held that greater scrutiny than the traditional rational b need be applied. *Malmed* v. *Thornburgh*, 621 F 565, 570 (3rd Cir. 1980) (Fourteenth Amendm Equal Protection and Due Process challenge mandatory retirement at 70 for state judge *Trafelet* v. *Thompson*, 594 F.2d 623, 630-631 Cir. 1979) (Fourteenth Amendment Equal Protec and Due Process challenge to mandatory retirem at 70 of elected state judges); *Rubino* v. *Ghe* 512 F.2d 431, 433 (2nd Cir.) *cert. denied*, U.S. 891, 96 S.Ct. 187 (1975) (First

Fourteenth Amendments challenge to mandatory retirement at 70 for elected state judges).

Petitioner, however, contends that the Court's treatment of ballot access cases supports his assertion that strict scrutiny should be applied to his equal protection claim. *Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983) (strict scrutiny applies to statute providing no access to the ballot for independent candidates). However, in *Anderson*, strict scrutiny was applied because the restriction had an impact on a specific class of voters. Petitioner has not demonstrated, nor could he, the Texas Constitutional provision serves to disenfranchise any identifiable class of Texas voters. In assessing the applicable standard of review, this Court has held: "Of course, not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review ... in approaching candidate restrictions, it is essential to examine in a realistic light the extent and the nature of their impact on voters." *Bullock v. Carter*, 405 U.S. 134, 143 (1972). In *Clements v. Fashing*, the Court provided guidance in analyzing this problem:

> Far from recognizing candidacy as a "fundamental right," we have held that the existence of barriers to a candidate's access to the ballot "does not of itself compel close scrutiny." *Bullock v. Carter*, 405 U.S. 134, 43. "In approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters." *Id.* ...Our ballot access cases ... do focus on the degree to which the challenged restrictions operate as a mechanism to exclude certain classes of candidates from the electoral process.

> The inquiry is whether the challenged restrictions unfairly or unnecessarily burden the "availability of political opportunity." *Lubin v. Panish*, 415 U.S. 709, 716 (1979)

Clements, 457 U.S. 957, 963-66.

Not all ballot access restrictions have requi "heightened" equal protection scrutiny. *Id.* far, the Court has departed from the rational ba review in only two lines of ballot access cas restrictions using classifications based on wea and restrictions involving classification schemes t impose burdens on new or small political parties independent candidates. *Id.*

Under the test balancing the character of asserted injury to voters' right with the intere advanced by the state, it is necessary to rev the challenged classification based on age a identify the injury it causes to Petition Petitioner has no fundamental right to run elective office. *Bullock*, 405 U.S. at 142-143. is there some fundamental right to vote for elderly. *Rubino v. Ghezzi*, 512 F.2d at 433. injury, if any, can only be to the voters' right vote for Petitioner. The First Amendment does reach this far. A voter is not guaranteed the ri to vote for a specific individual under the Fi Amendment. The First Amendment protects right of association in support of certain polit views and access to the ballot only to the ext that a citizen may vote for a candidate profess those views. *Anderson*, 460 U.S. at 793. "availability of political opportunity" is theref not lacking here. The Texas Constitution does obstruct the voters' freedom to support and cho their party's candidate.

Inasmuch as age is not a suspect classificati and there is no appreciable impact on an identifia class of voters, the proper level of inquiry to

applied in cases involving mandatory judicial retirement restrictions is whether the state had a rational basis for the restriction. Although age requirements for an office will inevitably exclude some number of qualified candidates, this does not mean such restrictions are unreasonable. Indeed, the United States Constitution contains numerous age requirements. These requirements, as well as those of the Texas Constitution, are not intended to deprive of representation that portion of the population not meeting their requirements; they are intended to enhance the average of the abilities of the officeholders in question. *See Hatten v. Rains*, 854 F.2d at 696 (concurring opinion of Judge Garwood.)

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
First Assistant Attorney General

LOU McCREARY
Executive Assistant Attorney General

JAMES C. TODD, Chief
General Litigation Division
State Bar No. 20094700
P. O. Box 12548
Capitol Station
Austin, Texas 78711-2548
(512) 463-2120

LAURI J. SCHNEIDAU
Assistant Attorney General
General Litigation Division
State Bar No. 20094700
P. O. Box 12548
Capitol Station
Austin, Texas 78711-2548
(512) 463-2120

ATTORNEYS FOR RESPONDENT JACK M. RAINS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent via U.S. Mail, certified, return receipt requested on this the 18th day of May, 1989, to:

Ms. Karen A. Lerner
Attorney at Law
2110 Richmond
Houston, TX 77098

David F. Webb
WEBB & HENDERSON
2200 Post Oak Blvd., Suite 420
Houston, TX 77056-4706

James C. Todd

JAMES C. TODD
Assistant Attorney General